> tionally be imposed after a jury verdict of guilty of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verict?' 444 U.S. 897, 62 L. Ed. 2d 132, 100 S. Ct. 204
>
> "We now hold that the death penalty may not be imposed under these circumstances..." (447 U.S. 625, 627, 65 L. Ed. 2d 392,396).

Thus , Beck was carefully limited to its facts. In fact, this Honorable Court expressly declined to extend the Beck rule to non-capital cases. See Note 14, 447 U. S. 625, 638, 65 L. Ed. 2d 392, 403.

A review of how the Alabama Courts have applied the Beck rule to cases in which there is no evidence of lesser included offenses follows.

In Ritter v. State ([S. Ct. Ala., 1981] 403 So. 2d 154) the Alabama Supreme Court reversed, on authority of Beck v. Alabama,[1] supra, the conviction

of a criminal defendant who had pleaded guilty to the capital offense, frankly admitted his guilt and demanded the death penalty. In denying rehearing in Ritter, the Court wrote:

> "...We believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, 639 F. 2d 221 [March 19, 1981] (1981)[2], which

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[1] "...SHORES, JUSTICE.

" Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65L. Ed. 2d 392 (1980), and Beck v. State [MS. Dec.19, 1980], 396 So. 2d 645 (Ala. 1980).

"REVERSED AND REMANDED."

[2] Pending in this Honorable Court on writ of certiorari sub.nom. Hopper v. Evans,80-1714,Certiorari granted June 22, 1981, sub nom. Britton v. Evans 49 U. S. L. Wk. 3954.

involved Ritter's partner in this crime..." (emphasis supplied).

Ritter established a pattern for all the pre-Beck cases. Retrial was deemed required by this Honorable Court's decision and opinion in Beck. See, for example, Bracewell v. State (S. Ct. Ala., 1981) 401 So. 2d 130. [3] The orders in

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[3] Initially the writ was denied on June 19, 1981, with a brief memorandum by Justice Maddox, which read:

"Petition for Writ of Certiorari is denied."

"By Denying the writ of certiorari in this case , we assume that the Court of Criminal Appeals after reviewing the record in this case, has determined that there wassome evidence presented which would have entitled the accused to an instruction on a lesser included offense.

"Writ denied." (unreported manuscript opinion) (Emphasis supplied.)

However, six (6) days later Justice Maddox's opinion was withdrawn on the Court's own motion, and the following was issued:

"The opinion dated June 19, 1981, is withdrawn and the following, together with Justice Maddox's special concurring opinion, is substituted in its place.

"WRIT DENIED." (Bracewell v. State [S Ct. Ala., 1981[401 So. 2d 130)

these cases result solely from the Alabama Supreme Court's understanding of Beck v. Alabama (supra). If there was ever any doubt about this, it was dispelled when this Honorable Court vacated and remanded the Ritter case for reconsideration of an alternative basis for these orders. Alabama v. Ritter 50 U.S.L. Wk. 3277 (Oct. 13, 1981) . On Dec. 11, 1981, the Alabama Supreme Court wrote:

> "The United States Supreme Court has remanded this case to this Court for further consideration in light of Reed v. State, Ala., [MS. June 12, 1981] ____So. 2d ____ (1981) extended on rehearing Aug. 28, 1981, motion for clarification denied (Oct. 7, 1981).
>
> " On June 12, 1981, this Court extended its initial opinion in the present case to explain that our reversal and remand was compelled by the decision of the United States Supreme Court in Beck v. Alabama, [447] U.S. [625], 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and was "consistent with the interpretation of that decision" reached by the Fifth Circuit in Evans v. Britton, [639] F. 2d [221] [March 19, 1981] (1981). We adopt our previous opinion and now unequivocally hold that our pre-

vious opinion in this case was based upon federal constitutional grounds. Moreover, our opinion in Reed v. State, supra, rather than altering our previous decision in this case explained further why we felt compelled by federal constitutional considerations to reverse the conviction in the case." (Ritter v. State [S. Ct. Ala., Dec. 11, 1981] _____ So. 2d _____) (Emphasis supplied).

The question here is not whether or not retrying all these cases is a good idea but whether this Honorable Court's decision in Beck mandates retrial in every case without regard to the evidence. The Alabama statute before the severence of the Preclusion Clause required that juries choose between guilt of the capital offense or absolute acquittal, even when the evidence suggested a middle verdict. However, had the Preclusion Clause never existed, this case would still have presented the Respondent's jury with the same choice. The evidence provided no basis for lesser included offenses.

Thus, the possibility of a verdict of guilty of a lesser included offense was precluded by the evidence and the constitutional prohibition against arbitrary and capricious verdicts. In other words, the Preclusion Clause had no impact whatever on this case.

Nothing in this Honorable Court's Opinion in Beck suggests a mandate for rubber stamp reversals of cases which could not have been affected in any way by the Preclusion Clause. In holding that it did, the Court of Criminal Appeals and Supreme Court of Alabama's decisions and opinions in this case are in conflict with Beck v. Alabama, supra.

A literal interpretation of Beck's "in every case" language is not required as the passage in question itself reveals. In that passage, this Court explained that the presence of lesser offense verdict options "may encourage the jury to convice for an impermissible reason" when

the jury has a "belief that the defendant is guilty of some serious [lesser included] crime and should be punished." Beck v. Alabama, 447 U. S. at 642. The only time the jury could rationally reach a "belief that the defendant is quilty of some serious [lesser included] crime," is when there is some rational basis in the evidence for such a belief. Therefore, the only cases in which preclusion of lesser offense verdict options could encourage capital offense convictions based on impermissible reasons are cases in which there is at least some evidentiary basis for a verdict convicting the defendant of a lesser offense instead of the capital offense.

The phrase "in every case" must also be limited insofar as it refers to the second "extraneous factor" set out in the paragraph

of the Beck opinion in question, which is that: "the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason - that, whatever his crime, the defendant does not deserve death." 447 U.S. at 642-643 (footnote omitted). This Court cannot have meant that there was a constitutionally intolerable risk of acquittal in Alabama capital cases tried before the Beck decision, because this Court pointed out that there had been a 96% conviction rate in pre-Beck capital cases. 447 U. S. at 641 & n. 18. Surely, a 4% acquital rate is not intolerably high.

What this Court did mean in the paragraph in question is evident from the particular argument that it was written to answer. Alabama had argued that any effect the pre-

slusion clause might have in influencing a jury to wrongfully convict a defendant of a capital offense when the evidence showed that the defendant was guilty of a serious lesser offense would be offset by the effect of the seeminly mandatory verdict form requirements. The argument was that when there was an evidentiary basis for a lesser offense, the preclusion clause's push toward improper convictions would be offset by the verdict form's pull toward improper acquittals. Beck v. Alabama, 447 U. S. at 638-641. This Court rejected that argument. id., at 639-643, but the important point here is that the language of the Beck opinion referring to an intolerable risk of erroneous factfinding "in every case" was intended to answer it. Because Alabama had argued that in every

case like Beck in which there was an evidentiary basis for a lesser included offense there would be an offsetting of pressures on the jury, this Court in rejecting that argument answered that in every such case "in every case" like Beck's there would be uncertain and unreliable factfinding. But in cases like the present one where there was no evidentiary basis for a lesser included offense, there was no pressure on the jury to erroneously convict the defendant of the capital offense in order to prevent his release, because there was no reason for the jury to believe that he was guilty of a serious lesser offense and should not be acquitted for that reason.

In Ritter v. State, supra, three justices of the Alabama Supreme

Court concluded that the Beck decision did not mandate the reversal of a pre-Beck conviction in the unusual case where the record affirmatively and undisputably eliminates any possibility that the defendant was harmed by the existance of the preclusion clause.[4] That is the

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[4] Those three justices of the Alabama Supreme Court were outvoted by a 6 member majority which concluded, "consisten[ly] with the interpretation of that decision reached by the 5th Circuit," that the Beck decision " compelled" the reversal of all pre-Beck capital convictions regardless of the facts. Ritter v. State, supra, slip op. at 2 (majority opinion), pp. 1a-2a, infra, id., at 3 (Torbert, concurring specially), p. 2a infra.

The fact that a majority of the Alabama Supreme Court, influenced by the 2 member majority in the court below, joined that court in misinterpreting the Beck decision simply proves that this Court needs to correct both courts. This court has the opportunity to correct the Alabama Supreme Court's misinterpretation of Beck in Alabama v. Ritter, No. 81-247 (certiorari filed Aug.6, 1981).

correct interpretation of the Beck decision.

We must add at this point what has already been incicated previously. That is, that this Respondent was in no way harmed by the existence of the preclusion clause. With this in mind we must submit that lacking such harm or prejudice the Alabama Court's decision below in Beck, supra, which was based on a fundamental Due Process Clause claim, can not stand.

There was no evidence of harm to the Respondent in this regard nor is there any evidence that the preclusion clause affected his defense. Thus, a finding below that there was a violation of fundamental fairness through due process can not stand. One simply should not be allowed to claim a denial of fundamental fairness. absent some harm or prejudice. This is another reason why the Alabama

Court's reliance on Beck, supra under these circumstances is improper.

IN THE ALTERNATIVE, THIS PETITION SHOULD NOT BE DECIDED UNTIL THIS COURT DECIDES THE EVANS CASE

As previously addressed herein this case presents one very important question concerning the Alabama Courts' interpretation and application of the Beck v. Alabama, 447 U.S. 625 (1980) decision. This same question has been previously raised in numerous other related cases, eg., Hopper v. Evans, No. 80-1714 (certiorari granted June 22, 1981 and presently pending in this Court) and Ritter v. Alabama, (cert. now pending). The question is also presented in separate petitions filed contemporaneously herewith, see: Alabama v. Bryars; Alabama v. Hill. The importance of this issue can not be under-stated.

Because of this importance and its effect on other Alabama cases, it is asked that the Court grant this certiorari petition and continue with a decision on the merits. However, if this petition is not granted then this petition should be held until a decision is reached in the Hopper v. Evans, supra case.

CONCLUSION

In conclusion the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Court of Criminal Appeals and the Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision and opionions of the Honorable Court of Criminal Appeals and Supreme Court of Alabama and on such review will reverse the decisions of said Courts granting a new trial to the Respondent.

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CERTIFICATE OF SERVICE

I, James F. Hampton, a Special Ass't. Attorney General of Alabama, and a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____day of _____, 1982, I did serve the requiste number of copies of the foregoing on the Attorney for the Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

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